IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 26TH NOVEMBER, 2007 / 5TH AGRAHAYANA, 1929

RSA.No. 1004 of 2007

(AS.419/2005 of I ADDL.DISTRICT COURT, ERNAKULAM
OS.1356/2001 of I ADDL.MUNSIFF COURT, ERNAKULAM)

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APPELLANTS/APPELLANTS/DEFENDANTS 1 TO 4:

1. VALSA, D/O.LATE VARGHESE, KADAVIL HOUSE, AGED 34 YEARS, SYRIAN CHURCH ROAD, ERNAKULAM, KOCHI-31.

2. JOHN, S/O.LATE VARGHESE, KADAVIL HOUSE, SYRIAN CHURCH ROAD, ERNAKULAM, KOCHI-31.

3. BABY, D/O.LATE VARGHESE, DO, DO.

4. JOMON, S/O.LATE VARGHESE, DO, DO.

BY ADV. SRI.T.K.KURIKESU

RESPONDENT:

T.F.JOSEPH, AGED 67 YEARS, S/O.CHEEKKAMMA, HOUSE NO.58/2077, THOTTATHUCHERRY HOUSE, SYRIAN CHURCH ROAD, ERNAKULAM,. KOCHI-31.

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 26/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M. SASIDHARAN NAMBIAR, J.

R.S.A.No. 1004 of 2007

Dated this the 26th day of November, 2007

J U D G M E N T

The defendants in O.S.No.1356 of 2001 on the file of Additional Munsiff's Court, Ernakulam are the appellants. Plaintiff in the above suit is the respondent. Respondent instituted the suit seeking a decree for mandatory injunction directing the appellants to cover the opening on the western side of the newly constructed septic tank so as to prevent emission of foul smell and also directing appellants to remove the steps illegally constructed encroaching into the plaint B schedule property. The case of respondent is that he is a co-owner in possession of the plaint A schedule property, which is originally owned by his father Cheekkamma who died in the year 1978. Plaint B schedule property is a part of plaint A schedule property which is used as a way by the family members of the respondent and others. Appellants are the children of one Mr.Kadavil Varghese. Defendants 5 and 6, who were not impleaded in the appeal, are the

children of Kadavil George. The mother of Kadavil George and Kadavil Varghese was a kudikidappukari under the father of the respondent. They were residing in a house situated in the northern side of the plaint B schedule property. Out of 20 cents of the property of the father of the respondent, a portion is occupied by the brother of the respondent- T.F.Francis and the balance extent of 12.615 cents is in the possession of the respondent. It is contended that there are three kudikidappu houses in the plaint A schedule property and one kudikidappu house is occupied by Smt.Anna Vacco. The successors in interest of Smt.Anna Vacco claimed kudikidappu right and as per order of this Court in C.R.P.No.2072 of 1998, it was found that the successors of Anna Vacco are entitled to only one kudikidappu right. They subsequently filed O.S.No.1012 of 1995 before Munsiff's Court. In that suit, their right was restricted to the residence in the kudikidappu house and respondent filed O.S.No.222/1995 in respect of the remaining portion of the plaint A schedule property

against the successors of late Anna Vacco. That suit was decreed except to the extent of right of peaceful residence in the kudikidappu house. Respondent filed O.S.No.699 of 1997 before the Sub Court, Ernakulam for partition of 17 cents of property including plaint A schedule property excluding 3 cents of property which was given by the father of the respondent as kudikidappu. Defendants in that suit did not appear. As against that judgment, A.S.No.398 of 2000 was filed before this Court. Thereafter, appellants started to construct a new concrete tank on the south western corner of the house encroaching into plaint A schedule property and because of the obstruction, construction was not completed. But with the help of the Assistant Commissioner of Police, construction was completed. It was also contended that they also illegally put up steps in the plaint B schedule property and they have no right to do so. It was contended that as the septic tank was not closed, it is in a highly unhygienic condition and foul smell emanated from the tank and therefore, the

respondent is entitled to a mandatory injunction directing appellants to close the tank. It was also contended that as the steps in the plaint B schedule property were put up without the permission of respondent, it was liable to be removed. A mandatory injunction was sought. Appellants resist the suit contending that plaint B schedule pathway is not part of the plaint A schedule property and father of appellants and defendants 5 and 6 were in occupation of separate kudikidappu buildings with the consent of the father of respondent and the pathway that lies on the southern side of the residential building of appellants is being used for ingress and egress to the kudikidappu site and plaint B schedule pathway is commonly used by the appellants, respondent and others and the steps so constructed are not causing any obstruction and therefore, respondent is not entitled to the decree sought for.

2. The learned Munsiff, after considering Exts.A1 to A3, Exts. B1 to B3 and C1 and C1(a) and the

evidences of Pws. 1 and 2 and Dws. 1 to 3, found that by not closing the opening of the septic tank, the appellant is causing foul smell emanate from the tank and therefore, respondent is entitled to a mandatory injunction directing appellants to close the opening on the western side of the newly constructed septic tank. Learned Munsiff also found that plaint B schedule pathway is commonly used by respondent and appellants and without the permission of the respondent, appellants have no right to put up any structure and the steps were illegally constructed encroaching into the plaint B schedule property and therefore, respondent is entitled to a decree for mandatory injunction to remove the steps. The suit was decreed.

3. Appellants challenge the decree and judgment before the District Court, Ernakulam in A.S.No.419 of 2005. The learned Additional District Judge, on re-appreciation of the evidence, found that Ext.C1 report and C1(a) plan show that plaint B schedule pathway is a common pathway used by appellants and respondent

which was admitted by appellants in para 5 of the written statement. It was also held that Ext.C1 report proved that the newly constructed foot steps were put up in the plaint B schedule property and those steps were constructed without the permission of the respondent and appellants are bound to remove the same. Learned District Judge also found that evidence on record establishes that foul smell emanates from the tank as there is an opening as found by the trial court. Therefore, confirming the decree granted by the Munsiff, appeal was dismissed. It is challenged in the second appeal.

4. Learned counsel appearing for the appellants heard. The argument of the learned counsel is that the plaint B schedule pathway was constructed by the appellants to reach the kudikidappu house and the foot steps are not causing any obstruction to the pathway and respondent is not entitled to the mandatory injunction for removal of the steps. In the appeal memorandum itself, appellants did not challenge the

portion of the decree with regard to the septic tank. The learned counsel argued that when plaint B schedule pathway was constructed by the appellants to enable them to use it as an ingress and egress to the kudikidappu house, courts below should not have granted the decree for mandatory injunction for removal of the steps.

5. On hearing the learned counsel, I do not find any substantial question of law involved in the appeal. In the written statement itself, status of the predecessor in interest of the appellants as kudikidappukaran under father of the respondent is admitted. As kudikidappukaran, appellants are only entitled to three cents of the property, which was not disputed by the respondent. The dispute is only with regard to the septic tank constructed and the steps on the plaint B schedule pathway. As far as the dispute with regard to the opening of the septic tank which was not closed, the court below on the evidence found that because of the opening, foul smell emanates from the septic tank and

therefore, it is liable to be closed. That portion of the judgment was not challenged by the appellants. The only challenge is with regard to the removal of the steps.

6. Though learned counsel vehemently argued that the plaint B schedule pathway was constructed by appellants and therefore, respondent is not entitled to the decree sought for, para 5 of the written statement establishes that appellants themselves admitted that plaint B schedule pathway is a common pathway used by appellants along with the respondent. That pathway does not form part of the kudikidappu. Appellants can only claim a right to use the pathway as a right appurtenant to the kudikidappu house. Respondent has not disputed the right of the appellants to use plaint B schedule pathway. The only objection is with regard to the illegal constructions of the steps in that pathway. Report of the Commissioner shows that the steps were constructed only within six months prior to the date of his inspection. There is no case for appellants that

permission was taken for constructing the steps in the pathway. It is, in such circumstances, it was held that appellants are not entitled to put up any steps or other constructions in the plaint B schedule pathway which is a common pathway available to the appellants and respondent and granted the mandatory injunction. I do not find any reason to interfere with the decree.

The appeal is dismissed in limine.

sd/-
M. Sasidharan Nambiar,
Judge

Mbs/

-True Copy-

P.A.to Judge.

V.K.MOHANAN, J.

Crl.M.C.NO. OF 200

J U D G M E N T

DATED: -0-2007